Canada Industrial Relations Board Conseil canadien des relations industrielles

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# Reasons for decision

United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial Service Workers International Union (United Steelworkers),

*applicant*,

*and*

Canadian National Railway Company,

*respondent*,

*and*

National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-Canada); and Teamsters Canada Rail Conference,

*intervenors*.

Board File: 26722-C

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Teamsters Canada Rail Conference

*applicant*,

*and*

Canadian National Railway Company,

*respondent*,

*and*

National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW - Canada); United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial Service Workers International Union (United Steelworkers); and Teamsters Canada Rail Conference, Maintenance of Way Employees Division,

*intervenors.*

Board File: 27730-C

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National Automobile, Aerospace, Transportation and General Workers Union of Canada
(CAW- Canada);

*applicant*,

*and*

Canadian National Railway Company,

*respondent*,

*and*

Teamsters Canada Rail Conference; United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial Service Workers International Union (United Steelworkers); and Teamsters Canada Rail Conference, Maintenance of Way Employees Division,

*intervenors.*

Board File: 27767-C

Neutral Citation: 2011 CIRB **594**
June 20, 2011

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The Canada Industrial Relations Board (the Board) was composed of Ms. Elizabeth MacPherson, Chairperson, and Messrs. Daniel Charbonneau and Patrick J. Heinke, Members. Two case management teleconferences were held on February 2, 2010 and September 19, 2010 in Ottawa, Ontario.

The Board has exercised its discretion pursuant to section 16.1 of the *Canada Labour Code (Part I–Industrial Relations)* (the *Code*) to decide these matters without an oral hearing.

**Counsel of Record**

Mr. Robert Monette, for Canadian National Railway Company;
Mr. Michael A. Church, for the Teamsters Canada Rail Conference;
Mr. Lewis Gottheil, for the National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-Canada);
Mr. Mark Rowlinson, for the United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial Service Workers International Union (United Steelworkers);
Mr. Michael J. Prokosh, for the Teamsters Canada Rail Conference, Maintenance of Way Employees Division.

**I–Background**

[1] On February 15, 2008, the United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union (USW) filed an application (Board file no. 26722-C) pursuant to section 18 of the *Code*, seeking a review of its existing certification to represent maintenance of way employees working for Canadian National Railway Company (CN or the employer). The union sought the inclusion of 12 employees working on the Savage Alberta Railway (SAR), a short line in Alberta owned by CN or, in the alternative, certification to represent a separate unit composed of these employees. In April 2008, this application was put in abeyance at the request of the parties while they attempted to resolve the matter. When these resolution efforts failed, the Board sought written submissions from the parties.

[2] In the meantime, the Teamsters Canada Rail Conference (TCRC) filed an application (Board file no. 27730-C) pursuant to sections 18, 18.1, 35, 44 and 45 of the *Code* on September 22, 2009, seeking to have running trades employees working on various short line rail operations in Alberta that had been repurchased by CN reintegrated into the main line bargaining units and collective agreements. TCRC's application relates to running trades employees on the Athabasca Northern Railway (ANY), the Mackenzie Northern Railway (MKNR) and the Lakeland & Waterways Railway (LWR).

[3] On October 8, 2009, the National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-Canada) (the CAW) filed an application (Board file no. 27767-C) pursuant to sections 18, 18.1, 35, 44 and 45 of the *Code*, seeking to have the shopcraft employees of MKNR reintegrated into the main line bargaining unit that it represents.

[4] On January 19, 2010, the Board determined that the TCRC and CAW applications raised similar issues and ordered that they be heard together pursuant to section 20 of the *Canada Industrial Relations Board Regulations, 2001* (the *Regulations*). Each applicant was granted intervenor status in the others' application. Following a case management teleconference with the parties, the Board gave notice to all of the unions representing employees on the various short line railways owned by CN on May 19, 2010, advising them that the Board's decision in these applications could establish a precedent with respect to the determination of appropriate bargaining units and representation rights for short line employees. As a result of these notices, the Board received two applications for intervenor status. Teamsters Canada Rail Conference, Maintenance of Way Employees Division (TCRC-MWED) was granted intervenor status in the TCRC and CAW applications, as it represents maintenance of way employees at MKNR. The USW was also granted intervenor status in the TCRC and CAW applications, as they raise issues similar to those in dispute in Board file no. 26722-C. At the request of the parties, the Board did not consolidate the USW's application with the TCRC and CAW applications, although these organizations were granted reciprocal intervenor status in the USW application. It was understood by all parties that determination of the USW's application would follow the Board's determination of the TCRC and CAW applications.

[5] On January 12, 2011, the Board issued an interim decision, *Canadian National Railway Company*, 2011 CIRB 563 (RD 563), in which it set out the background and facts relating to these three applications. This decision should be read in conjunction with RD 563, which held the following:

> [55] Thus, while section 44 of the *Code* preserves the *status quo* in the event of a sale of business, section 45 provides the Board with the ability, on application by the employer or an affected trade union, to review the bargaining unit structure that results from the normal operation of section 44. The distinction between sections 45 and 18.1 identified above make it clear that, when dealing with an application for a bargaining unit review consequent to a sale of business, the Board need not impose the strict test that it has established under section 18.1 of the *Code* to satisfy itself that the existing bargaining unit structure is "no longer appropriate for collective bargaining" (see *Canadian National Railways*, 2009 CIRB 446). The mere fact that a sale of business has occurred and one of the affected parties has applied to the Board under section 45 is sufficient to trigger a bargaining unit review if the Board feels it is warranted by the circumstances. In conducting a review pursuant to section 45, the Board will consider all of the factors that it takes into account in a review pursuant to section 18.1, including the history of bargaining, the interests of the employees in the various bargaining units and the nature of the work that they perform (see: *Sécur Inc.*, 2001 CIRB 109; *Island Tug & Barge*, 2001 CIRB 112; and *Expertech Network Inc. et al*, *supra*). Certain factors, such as evidence of organizational change and the intermingling of employees, may make it obvious that the existing bargaining unit structure requires revision. In addition, the Board will consider whether there is a bargaining unit configuration that is more likely to lead to harmonious labour-management relations. As the Board stated in *Sécur Inc.*, *supra*:
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> "[60] The question of reconfiguring the units is not exempt from the fundamental objectives of the *Code* of which the Board is required to establish the practical side. Accordingly, the reconfiguration of bargaining units must promote the employees' exercise of the rights conferred by the *Code* while enabling the business to be operated properly. The Board must therefore deal with a reconfiguration with a sufficiently long-term vision to contribute to the development of relations between the bargaining agents and the employer with regard to the proposed units. While considering these general principles, the Board will nonetheless take into account the specific facts of each application."
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> [56] CN does not dispute the fact that a sale of business took place when it repurchased the four short lines at issue in these applications. With respect to the portions of the TCRC application that relate to ANY and MKNR, CN contends that the Board has already dealt with the union's sale of business application and found that separate bargaining units for these short lines are appropriate. However, the Board notes that both certification orders that it issued as a result of these business sales (9472-U and 9473-U) were dealt with in isolation. The instant applications (26722-C, 27730-C and 27767-C) present the first opportunity that the Board has had to look holistically at the bargaining unit structure for the CN short lines in Alberta.
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> [57] In their submissions, the parties have presented the Board with two diametrically opposed options: CN and the TCRC-MWED arguing for maintenance of the *status quo* and the TCRC, CAW and USW arguing for the inclusion of the short line employees into their existing mainline bargaining units.
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> [58] A review of the *status quo* in this case reveals that the parties have been unable to negotiate collective agreements for the various short line bargaining units, despite the length of time that has passed since the previous agreements expired. In making this observation, the Board does not seek to place blame on any party. The current situation is simply reflective of the fact that, given the relatively small number of employees in each bargaining unit, the negotiation of new collective agreements is

> not a high priority for either the employer or the unions. This is understandable in view of the demands placed on their time and relationships by the much larger mainline bargaining units. The current reality is sufficient justification for the Board to conduct a review of the existing bargaining unit structure for all of CN's short lines in Alberta, as contemplated in and authorized by sections 45 and 18.1(2) to (4) of the *Code*.
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> [59] When the Board determines the contours of bargaining units, its primary purpose is to create units conducive to constructive collective bargaining and harmonious labour management relations. Between the two extremes advocated by the parties, there are a number of other bargaining unit configurations that may be more appropriate than the existing structure. For example, the Board could create a single bargaining unit for all short line employees in Alberta. Alternatively, the bargaining units could be delineated on a traditional craft or trade basis - for example, "all shopcraft employees working on CN short lines in Alberta", "all maintenance of way employees working on CN short lines in Alberta" and "all running trades employees working on CN short lines in Alberta." A third option would be to establish bargaining units consisting of all employees at each of the four Alberta short lines. All of these options would require the conduct of a representation vote to determine which of the incumbent bargaining agents would take over representation rights for the revised bargaining unit(s).
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> [60] In their respective submissions, the parties have not, to date, contemplated the possibility of the additional options identified above. In coming to a conclusion with respect to this matter, the Board will require their respective submissions on the practicality and appropriateness of each option. However, prior to soliciting such submissions, the Board wishes to provide the parties with one further opportunity, pursuant to section 18.1(2)(*a*) of the *Code*, to reach agreement with respect to the determination of the appropriate bargaining unit(s) for CN short line employees in Alberta. Accordingly, the Board orders the parties to collectively undertake discussions aimed at reaching such an agreement **within the 60 days following the date of this decision**. Failing such agreement, the parties are to provide the Board with their written submissions on the question **no later than April 15, 2011.**
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> (emphasis in original)

[6] The Board understands that no agreement was reached between any of the parties within the time frame that was provided to them pursuant to section 18.1(2)(*a*) of the *Code*, and the Board has not received any request from any of the parties seeking a further period of time to pursue these discussions. The Board is of the opinion that the parties have been provided with a reasonable period of time in which to reach an agreement, that such agreement is not possible, and that it is appropriate for the Board to determine the questions raised by these applications. As directed in RD 563, the parties have filed their further written submissions, which have been carefully considered by the Board. For the reasons that follow, the Board has determined that it is appropriate to grant the USW, TCRC and CAW applications.

## II–Positions of the Parties

### A–The TCRC

[7] The TCRC maintains the position it had taken earlier and which is set out in RD 563. It confirms that no collective agreements have been negotiated for the three short line units that it currently represents, and states that the employees in these units are becoming frustrated and disillusioned. The TCRC submits that none of the options set out by the Board in paragraph 59 of RD 563 are appropriate in this case and reiterates its position that the short line employees should be included in the national bargaining units that it represents. The TCRC submits that the multiplicity of units for running trades employees presently in existence on the short lines is outdated and inappropriate, for the reasons referred to in its earlier pleadings. It states that there has been a merger of employees, and employees from the national bargaining unit work alongside the short line employees.

[8] The TCRC submits that CN has effectively reintegrated the business operations of these short lines back into its national railway system and that the Board should therefore address the bona fide changes to the bargaining units that follow from this corporate restructuring. It states that the current structure is creating tensions because employees doing the same work are working under different terms and conditions of employment based on the bargaining unit to which they belong. It suggests that the small short line bargaining units are not appropriate for collective bargaining and should be merged with the national units. TCRC suggests that the Board should find that, once CN repurchased each of the short lines, the running trades employees necessarily became subject to the appropriate national certification order and collective agreement, depending on their craft.

### B–The CAW

[9] The CAW also rejects the options identified by the Board in RD 563 and continues to take the position that the only appropriate option with respect to the shopcraft employees at MKNR is to include them in the national shopcraft bargaining unit for which it holds bargaining rights. The CAW points out that the number of shopcraft employees at MKNR is very small (only six or seven active employees), and that conducting negotiations and administering a collective agreement for this small

group of workers in a stand alone unit is inefficient. It suggests that there is an evident community of interest within each craft or trade that would justify a single national bargaining unit for both main line and short line employees.

[10] The CAW argues that there are a number of indicia of the complete integration of MKNR employees into CN. It points to the manner in which senior CN officials have engaged in the administration of labour relations for MKNR employees and to the posting of notices in the McLennan yard advertising vacant positions at various locations within CN's Mountain Region. The CAW argues that the current separation of the short line employees from their colleagues on the main line for labour relations purposes is unworkable and that the short line employees should have their terms and conditions of employment governed by the national shopcraft agreement.

**C–The USW**

[11] The USW continues to take the position that all of the maintenance of way employees working on the short lines are properly part of the USW's national bargaining unit. The USW states that by integrating these employees into the national bargaining units, the employees would have access to all of the benefits of a large national bargaining unit and access to positions in a much larger unit. It points out the delays that have been encountered in negotiating a collective agreement for shopcraft employees at the MKNR and suggests that experience demonstrates that the same would be true for any small short line bargaining unit, including SAR.

[12] In addition to the employees at SAR that the USW has organized, it requests that the Board also include in its national unit the maintenance of way employees at MKNR currently represented by the TCRC-MWED. The USW also argues that, since the re-acquisition of the Alberta short lines by CN, maintenance of way employees from the mainline have been assigned to work on the short lines and both SAR and MKNR and vice-versa. It suggests that it does not make labour relations sense for employees doing the same work for the same employer to be in different bargaining units represented by different unions and that the MKNR employees share a community of interest with the mainline and other Alberta short line maintenance of way employees.

**D–TCRC-MWED**

[13] The TCRC-MWED is in a different position than the other unions involved in these applications, given that it does not represent a national bargaining unit at CN. At the time that CN sold the Alberta short lines at issue in this matter, the certified bargaining agent for all CN maintenance of way employees was the Brotherhood of Maintenance of Way Employees (BMWE). Neither ANY or LWR recognized the BMWE following the sale and it does not appear that the BMWE sought successor rights or provincial certification orders in respect of the employees at those short lines. However, Rail Link voluntarily recognized the incumbent bargaining agents for each of the employee groups, including the BMWE, working on the MKNR short line. Although the USW replaced the BMWE as the bargaining agent for maintenance of way employees at CN as a result of a displacement proceeding (Order no. 8745-U, issued November 25, 2004), maintenance of way employees at MKNR remained members of the BMWE. The employer's voluntary recognition of the BMWE was transferred to the TCRC-MWED when the BMWE transferred jurisdiction over its Canadian members to the TCRC in 2004. The Board issued an order confirming the transfer of jurisdiction from the BMWE to the TCRC-MWED in respect of a number of railways, including MKNR, on December 21, 2004 (Board order no. 8766-U).

[14] The Board has been advised that, in February 2011, CN and the TCRC-MWED reached a new collective agreement for the MKNR employees that has a term of May 3, 2008 to May 3, 2013 and that this agreement was ratified by the membership. The TCRC-MWED therefore argues that this is evidence that its bargaining unit is appropriate for collective bargaining and should not be merged into the national bargaining unit represented by the USW. It suggests that MKNR employees have a different community of interest, given that they benefit from a Northern Living Allowance and Vacation Supplement. The TCRC-MWED further suggests that the USW's application is a disguised attempt to raid the MKNR unit without obtaining the support of the employees in that bargaining unit. The TCRC-MWED suggests that it would be inconsistent with the *Code* for the Board to interfere in a bargaining relationship that is functioning well and with which the bargaining unit members are satisfied. It asks the Board to dismiss the USW application insofar as it affects employees at MKNR.

**E–Canadian National Railway Company**

[15] CN continues to oppose the TCRC, CAW and USW applications and reaffirms the arguments it made in this regard in its previous pleadings, as set out in RD 563. CN also rejects the other options for a revised bargaining unit structure identified by the Board in RD 563. CN remains of the view that the short lines do not depend on the mainline to complete their operational objectives. Given the distinct geographic, economic and operational realities in which the short lines function, CN suggests that there is simply no community of interest between the shortlines and the main line. CN points out that it has negotiated collective agreements with both the TCRC-MWED for MKNR maintenance of way employees and with the CAW Local 4001 for the running trades employees at SAR. CN suggests that industrial peace is the norm at the short lines and that short line employees wish to remain distinct from the mainline bargaining units. It further suggests that the current inability of the TCRC and CAW to negotiate collective agreements for the short line units that they represent is based on the hope that they will achieve national standards for these properties as a result of these applications.

**III–Analysis and Decision**

[16] As noted in RD 563, section 45 of the *Code* gives the Board considerable discretion to determine whether the employees affected by a sale of business constitute one or more units appropriate for collective bargaining. In this case, the employer has conceded that a sale of business has taken place, and therefore there is no dispute that section 45 applies to the applications under consideration here.

[17] Determining an appropriate bargaining unit is more of an art than a science. For this reason, the *Code* only requires that the Board define an appropriate bargaining unit, not necessarily the most appropriate bargaining unit. In the instant case, as the Board has observed previously, the parties take diametrically opposed views as to what the appropriate bargaining units for the short line employees should be. While the Board recognizes the validity and importance of the economic and operational concerns expressed by the employer, the history and experience of the short line bargaining units, considerations of community of interest and the application of the Board's general policy favouring

larger units, has persuaded the Board that, with certain exceptions that will be explained below, there should be a single national bargaining unit for CN employees working in similar crafts or trades, whether they work on the mainline or on a short line.

[18] Historically, prior to the sale of the short lines by CN in the late 1990s, employees on these short lines were in the same bargaining unit as the mainline employees performing the same trade or craft. During the period when the short lines were owned by entities other than CN, a number of these employees (such as those on the ANY and LWR) were either unrepresented or, if represented, did not have a collective agreement. Those who did have a collective agreement during that period (i.e., those in the various units at MKNR and the running trades at SAR) have waited a considerable period of time since CN repurchased the short lines in 2006 to renegotiate their working conditions, and some still do not have new collective agreements even as of this date. In a regime such as that set out in the *Code*, which explicitly favours collective bargaining as the basis for effective industrial relations, the determination of good working conditions and sound labour management relations, the Board is of the view that the circumstances of this case require a restructuring of the bargaining units to allow employees to exercise and benefit from the full measure of their statutory rights.

[19] In considering the respective submissions of the parties and endeavouring to fashion bargaining units that will encourage constructive collective bargaining, the Board has developed the following criteria to guide its deliberations in sale of business cases:

> 1) in general, when the bargaining unit(s) at the company being purchased (in this case, the short line) and the employer that is purchasing it (in this case, the mainline) are represented by the same bargaining agent, the bargaining units should be merged, unless the parties agree on a different configuration in accordance with section 18.1 of the *Code*;
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> 2) when the employees of the employer being purchased (in this case, the short line) perform the same work as the employees of the purchaser, are unrepresented and represent a small minority in comparison with the number of employees in the purchaser's bargaining unit, they should become members of the purchaser's bargaining unit as of the date of the order;

3) if the unrepresented employees of the company being purchased outnumber the unionized employees working for the employer that is acquiring the business, then the union must organize the new employees (i.e., the double majority rule applies);

4) when employees performing the same or similar work in bargaining unit(s) at the employer being purchased and those of the purchaser are represented by a **different** bargaining agent, the Board will exercise its discretion under sections 45 and 18.1(4) of the *Code* according to the circumstances of each case to determine whether the units should be merged and, if so, which bargaining agent will represent the employees.

[20] In this case, there are two short line bargaining units that are represented by a different bargaining agent than those representing the same trades or crafts at the main line: the running trades employees at SAR and the maintenance of way employees at MKNR. In the circumstances of this case, where the global review of the bargaining unit structure at CN's Alberta short lines came about because of three separate, discrete applications for limited orders affecting specific bargaining units consequent to a sale of business, and the two bargaining units in question have current collective agreements in place, the Board is prepared to leave these two bargaining units undisturbed for the time being. While this constitutes an exception to the general principle that employees performing the same work should be in the same bargaining unit, it respects the right of these employees to continue to be represented by the bargaining agent of their choice. In the event that the employees in either or both of these two small short line bargaining units indicate a desire to join the main line bargaining unit, the Board will entertain an application pursuant to section 24 of the *Code* at the appropriate time.

[21] As a result of the application of these criteria in the instant applications, the running trades employees on the ANY, MKNR and LWR, but not the SAR, become members of the TCRC mainline bargaining units at CN and are to be covered by the collective agreement applicable to the respective craft bargaining unit to which they belong, effective as of the date of this decision. No amendment is required to the existing TCRC certification orders (nos. 8630-U and 9507-U), as these units are already defined as "all employee" units. However, those certification orders are subject to the pre-existing rights of other unions representing running trades employees on various short lines.

For example, the CAW remains the bargaining agent for the combined unit of running trades employees at SAR.

[22] Similarly, the shopcraft employees at ANY, MKNR, LWR and SAR become members of the CAW's national bargaining unit (certification order no. 6495-U) and are subject to the collective agreement applicable to that unit as of the date of this decision. The Board will entertain representations from the parties regarding the amendments to order no. 6495-U that are required to give effect to this decision; such representations are to be filed **no later than 30 days from the date of this decision.**

[23] Maintenance of way employees at ANY, LWR and SAR will become members of the USW's national bargaining unit (certification order no. 8745-U) as of the date of this decision. However, maintenance of way employees at MKNR will continue to be represented by the TCRC-MWED. The parties are to advise the Board **within 30 days of this decision** whether any amendments to certification order no. 8745-U are required in order to give effect to this decision.

[24] The Board retains jurisdiction to deal with any matters arising as a result of this decision.

[25] This is a unanimous decision of the Board.

Elizabeth MacPherson
Chairperson

Daniel Charbonneau
Member

Patrick J. Heinke
Member